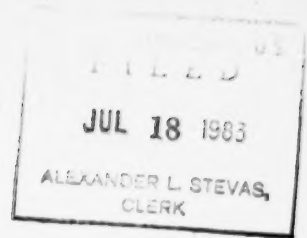


83-84

83-84

No. _____



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

LEO E. BALK,

PETITIONER,

v.

UNITED STATES INTERNATIONAL
COMMUNICATION AGENCY

(now - UNITED STATES INFORMATION
AGENCY)

and CHARLES Z. WICK, DIRECTOR

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT AND REQUEST
FOR SUMMARY REVERSAL

Leo E. Balk, Petitioner,
2519 Holman Ave.
Silver Spring, Md. 20910

(301)-587-0091

QUESTIONS PRESENTED:

I. Whether a U.S.Court of Appeals can remand for dismissal an employment discrimination case already dismissed without prejudice by the District Court on the grounds which have ceased to exist during the appellate procedure and, as a result, have mooted the appeal?

2. Whether a U.S.Court of Appeals can remand for dismissal an employment discrimination case under the Equal Pay Act, 29 USC, Sec.206(d)(I), 2I6(b), already dismissed by the District Court on the ground of nonexhaustion of administrative remedies?

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES INTERNATIONAL
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and CHARLES Z. WICK, DIRECTOR

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT AND REQUEST
FOR SUMMARY REVERSAL

Leo E. Balk, a U.S. citizen and an employee of the U.S. Information Agency (former-U.S. International Communication Agency)

*Angie Garcia, Director, Office of Personnel Services, USIA, was originally also a party to this case.

respectfully petitions for a writ of certiorari to review and to summarily reverse the order of the U.S.Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The order of the Court of Appeals sought to be reviewed is presented in App.A,infra, pp. I-3 , and memorandum-opinion and order of the District Court - in App.A,infra, pp.4-II .

JURISDICTION

The order of the Court of Appeals to dismiss the appeal and the case was entered on April 19, 1983. The jurisdiction of this Court is invoked under 28 USC, Sec.1254(I).

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964 -
42 USC, Sec.2000e-I6

The Age Disrimination in Employment Act -
29 USC, Sec.633a .

The Equal Pay Act - 29 USC, Sec.206(d)(I),
and Sec.2I6(b).

STATEMENT

In July 1980 Petitioner Leo E. Balk, being employed by the Voice of America, U.S. International Communication Agency, filed with the Agency a detailed administrative complaint for employment discrimination. This employee's complaint contained the allegations and the evidence of discrimination in job assignments, grade, and pay without, however, any references to the U.S. law on employment discrimination or statements that he believed to be discriminated on an account prohibited by the law. In its reply the Agency ignored factual allegations of discrimination and suggested that Petitioner should file a classification appeal. It then rejected the appeal and continued its discrimination against Petitioner.

In July 1981 Petitioner filed his complaint with the District Court and soon by two sets of interrogatories clearly established his prima facie case of continuous employment discrimination. The government, meanwhile, did not bother to even answer Petitioner's discovery requests and in January 1982 moved the Court for an order to

stay discovery. Petitioner, in his turn, moved to compel discovery. In March 1982 with the leave of Court given upon Government's consent Petitioner filed his Third Amended Complaint against discrimination on account of sex, age, and national origin in violation of the Equal Pay Act, the Age Discrimination in Employment Act, and Title VII.

The District Court never ruled on discovery motions and, seven months later, dismissed the case without prejudice "for failure to exhaust administrative remedies." Petitioner appealed and, at the same time, filed with the Agency his new administrative complaint based on the same three causes of action. It was rejected by the Agency in December 1982. The Court of Appeals dismissed Petitioner's appeal as moot in its entirety, vacated the District Court's order to dismiss the case, and remanded it to the District Court to...dismiss.

On June 9, 1983 - the day the case was transmitted from the Court of Appeals back to the District Court - Petitioner moved the Court to toll the 30-days limitation period (42 USC, Sec. 2000e-16(c)) to allow

him to file new complaint under the Title VII. On July 18, 1983, the last day of the 90-days period for filing this petition, there was no ruling by the District Court on the Petitioner's motion.

REASONS FOR GRANTING THE WRIT

Petitioner's second administrative complaint was rejected by the Agency when his appeal on the issue whether or not he had exhausted administrative remedies was before the Court of Appeals. The case therefore did become moot for appellate proceedings. But, as the case had already been dismissed by the District Court without prejudice and the issue of exhaustion had now been resolved, the Court of Appeals should have remanded the case for consideration on the merits.

More important, however, is that not the entire case was mooted on appeal by the Agency's rejection of Petitioner's second administrative complaint: his action under the Equal Pay Act (29 USC, Sec. 206(d)(1), 216(b)) should have not been dismissed by the District Court because the law sets up no exhaustion requirements for such cause of action by an American employee.

In Barrentine et al. v. Arkansas-Best Freight System, Inc. et al., IOI S.Ct.1437 (1981), this Court held:

The statutory enforcement scheme grants individual employees broad access to the courts. Section 16(b) of the Act, 29 USC, Sec. 216(b), which contains the principal enforcement provisions, permits an aggrieved employee to bring his statutory wage and hour claim "in any Federal or State Court of competent jurisdiction". No exhaustion requirement or other procedural barriers are set up, and no other forum for enforcement of statutory rights is referred to or created by the statute.

Barrentine, supra, at 1444; see also footnote 16 on that page.

The Court of Appeals, therefore, in the spirit of Diffenderfer v. Central Baptist Church, 404 US 412, 30 LEd 2d 567, and Crowell v. Mader, 444 US 505, 62 LEd 2d 701 (1980), should have reminded the case for consideration on the merits upon at least this cause of action.

CONCLUSION

For the reasons stated the petition for a writ of certiorari and the request for summary reversal of the order below should be granted.

Respectfully submitted,

July 1983

Leo E. Balk, Petitioner

APPENDIX A

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UNITED STATES
COURT OF APPEALS

For The District of Columbia Circuit

No. 82-2248

September Term, 1982

Leo E. Balk,
Appellant

Civil Action No.
81-01565

v. United States Court of
Appeals

Angie Garcia, Director for the
Office of Personnel District of
Services, U.S. Inter- Columbia Circuit
national Communication (FILED APR 19 1983
Agency GEORGE A. FISHER
Clerk)

BEFORE: Tamm and Bork, Circuit Judges
and McGowan, Senior Circuit Judge

O R D E R

Upon consideration of appellant's
motion to file supplemental brief, and
appellees' motion to dismiss appeal as
moot, and the response thereto, it is

ORDERED by the Court that the motion
to file supplemental brief is granted.

This Court declines, however, to entertain
appellant's request in the motion that it

toll the statute of limitations for the filing of a new complaint in District Court. While the thirty day limitation period is subject to equitable tolling, Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 398 (1982), this issue must be addressed in the first instance by the District Court. See Miller v. Avirom, 384 F.2d 319, 321 & N. 8 (D.C. Cir. 1967). It is

FURTHER ORDERED by the Court that the motion to dismiss appeal is granted. The submission of both parties make it clear that the issues raised on appeal have become moot by appellees' final rejection of appellant's administrative complaint of discrimination. The opinion and order of the District Court are vacated and the case is remanded for dismissal of the plaintiff-appellant's complaint. United

States v. Munsingwear, 340 U.S. 36, 39 &
N.2 (1950). It is

FURTHER ORDERED by the Court, sua
sponte, that the Clerk shall withhold
issuance of any timely petition for
rehearing. See Local Rule 14, as amended
on June 15, 1982.

Per Curiam

Circuit Judge Tamm did not participate in
the foregoing order.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEO E. BALK	:	
	:	
Plaintiff	:	
	:	
v.	:	Civil Action
	:	No. 81-1565
UNITED STATES	:	
INTERNATIONAL	:	
COMMUNICATION	:	
AGENCY, <u>et al.</u>	:	(FILED SEP 17
	:	1982
Defendants	:	CLERK U.S.
	:	DISTRICT COURT
	:	DISTRICT OF
	:	COLUMBIA)

MEMORANDUM OPINION

On July 8, 1981, plaintiff, a GS-11 Foreign Language Broadcaster in the USSR Division of the Voice of America, filed suit under the Civil Service Reform Act and the Administrative Procedure Act for defendants' failure to provide him with "equal pay for equal work." Plaintiff recently amended his complaint to state three causes of action: 1) a claim under Title VII for discrimination on the basis of sex and national origin; 2) a claim

under the Age Discrimination in Employment Act; and 3) a claim under the Equal Pay Act. Defendants have filed a motion to dismiss or, in the alternative, for summary judgment. Because plaintiff has failed to exhaust his administrative remedies with respect to all three causes of action, defendants' motion to dismiss will be granted.

The basis of plaintiff's suit is an administrative complaint submitted on July 3, 1980, which dealt exclusively with plaintiff's claim that he has been denied "equal pay for equal work."* Plaintiff's amended complaint asserts that "(d)efendants' answer to plaintiff's administrative complaint of July 3, 1980, ignored the

*That complaint was supplemented by a submission on July 15, 1980. No new issues, however, were raised in this submission.

allegation of discrimination." Third Amendment Complaint Par. 6. Yet, plaintiff's administrative complaint is devoid of any reference to discrimination with respect to sex, national origin, or age. Moreover, plaintiff's amended complaint fails to allege that plaintiff has sought any administrative relief for defendants' allegedly discriminatory failure to promote plaintiff to GS-12 positions in April and June 1981. Id., Prs. 6-10. Consequently, plaintiff's first and second causes of action which allege sex, national origin, and age discrimination must be dismissed for failure to seek, much less exhaust, administrative remedies. See, e.g., McKart v. United States, 395 U.S. 185, 195 (1969); Douglas v. Hampton, 512 F.2d 976 (D.C. Cir. 1975).

In contrast to plaintiff's first two causes of action, plaintiff's third cause

7

of action relates directly to the administrative complaint of July 3, 1980. Nevertheless, plaintiff again runs afoul of the doctrine of administrative exhaustion because he has failed to file a classification appeal with the Office of Personnel Management. See 5 C.F.R. § 511.601 et seq. (1982). A classification appeal is expressly designed to ensure that "the principle of equal pay for substantially equal work will be followed," 5 U.S.C. § 5101(1)(A) (1976), precisely the relief that plaintiff seeks in his third cause of action. There was no encumbrance to plaintiff's pursuit of a classification appeal for over seven months prior to the filing of the instant lawsuit.* If the

*It is true that plaintiff filed a classification appeal on August 4, 1980. The Office of Personnel Management could not consider plaintiff's appeal at that time because plaintiff did not have a civil service position, a prerequisite to the availability of a classification appeal. On December 28, 1980, however,
(continued)

Office of Personnel Management eventually adopts plaintiff's views in the classification appeal, plaintiff will obtain full

*(continued) plaintiff converted from an excepted position to a civil service appointment and became eligible to file a classification appeal. Yet, plaintiff instead filed suit in federal district court. Merely because plaintiff was unable to file a classification appeal at one point shortly after the filing of his administrative complaint does not excuse him from seeking a federal district court. While plaintiff might be in a more appealing position had he institute suit prior to becoming eligible to seek a classification appeal, plaintiff cannot be permitted to ignore the administrative process where he could have sought a classification appeal for over seven months prior to the time he filed suit.

relief without intervention of the federal courts. Accordingly, plaintiff's third cause of action also will be dismissed for failure to exhaust his administrative remedies.

An Order consistent with this Memorandum Opinion will be entered this date.

s/s

NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT COURT

DATED: September 17, 1982

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEO E. BALK,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action
	:	No. 81-1565
	:	
UNITED STATES	:	
INTERNATIONAL	:	(FILED SEPTEMBER
COMMUNICATION	:	17, 1982
AGENCY, <u>et al.</u> ,	:	CLERK, U.S.
	:	DISTRICT COURT
Defendants	:	DISTRICT OF
	:	COLUMBIA)

O R D E R

Upon consideration of defendants' motion to dismiss, or in the alternative for summary judgment, plaintiff's opposition, and the accompanying memoranda of law, it is this 17th day of September, 1982,

ORDERED that defendants' motion to dismiss be, and hereby is, granted; and it is further

II

ORDERED that the above-captioned case be, and hereby is, dismissed without prejudice for failure to exhaust administrative remedies.

NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

No. 83-84

Office Supreme Court, U.S.
FILED

SEP 20 1983

ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

LEO E. BALK, PETITIONER

v.

UNITED STATES INTERNATIONAL COMMUNICATIONS
AGENCY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT*

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
*Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217*

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-84

LEO E. BALK, PETITIONER

v.

UNITED STATES INTERNATIONAL COMMUNICATIONS
AGENCY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT*

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner, a GS-11 Foreign Language Broadcaster in the U.S.S.R. Division of the Voice of America, seeks relief from the United States International Communication Agency's (USICA) alleged employment discrimination (Pet. App. 4). He contends that the court of appeals erroneously dismissed as moot his appeal from an order of the district court that dismissed his complaint (which alleged employment discrimination on the basis of age, national origin and gender) for failure to exhaust administrative remedies.

1. On July 3, 1980, petitioner filed an Equal Pay Act claim with the USICA (Pet. App. 5). After a series of refilings and appeals of his original complaint with USICA and the Office of Personnel Management, petitioner filed a civil complaint in the United States District Court for the District of Columbia on July 8, 1981 (*id.* at 4). His amended

complaint set forth three causes of action: (1) a claim under Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e-16; (2) a claim under the Age Discrimination in Employment Act of 1967, 29 U.S.C. (& Supp. V) 633a (ADEA); and (3) a claim under the Equal Pay Act of 1963, 29 U.S.C. 206(d)(1) (Pet. App. 4-5). The district court dismissed the suit without prejudice for failure to exhaust administrative remedies (Pet. App. 10-11), and petitioner filed a notice of appeal on October 15, 1982. In the interim, however, petitioner filed an administrative complaint with the Equal Opportunity Office at USICA, which was rejected as untimely on December 17, 1982. Because the sole issue before the court of appeals — whether petitioner's complaint was properly dismissed for failure to exhaust administrative remedies — was thereby rendered moot, the court vacated the district court's opinion and order and remanded the case for dismissal pursuant to *United States v. Munsingwear*, 340 U.S. 36, 39 & n.2 (1950) (Pet. App. 1-3).¹

2. The court of appeals properly dismissed petitioner's appeal because the only issue before the court was rendered moot by petitioner's filing and the USICA's rejection of his administrative complaint. The court of appeals' consideration of the propriety of the district court's dismissal order, in these circumstances, would have been purely academic.

In any event, the district court correctly dismissed petitioner's Title VII and ADEA claims because he did not even seek, let alone exhaust, his administrative remedies prior to filing his complaint. Both Title VII and the ADEA set forth specific administrative schemes that an aggrieved employee

¹Following dismissal of his appeal, petitioner filed a motion in the district court to toll the statute of limitations for filing a new claim. The district court denied petitioner's motion to toll the statute of limitations with respect to his Title VII and ADEA claims, but allowed him to pursue his Equal Pay Act claim. Order of August 15, 1983.

must pursue before he may file suit in federal court, and petitioner unquestionably failed to follow these procedures before commencing the present litigation.

Section 717(c) of Title VII authorizes a civil action after the petitioner has first filed a complaint with the agency. If no final action is taken within 180 days after such filing, the employee may bring suit in federal court. 42 U.S.C. 2000e-16(c).² Otherwise, he may sue within 30 days of his agency's final action. *Ibid.*; see also *Brown v. GSA*, 425 U.S. 820, 829, 832 (1976) (employee must exhaust administrative remedies before bringing suit in federal court); *President v. Vance*, 627 F.2d 353, 360 (D.C. Cir. 1980) (same). Under the ADEA, 29 U.S.C. 633a(c) and (d),³ an employee may

²Section 717(c), 42 U.S.C. 2000e-16(c), provides in relevant part:

Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section * * * on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section * * *, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit * * * until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

³Section 633a(d) states:

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

either file an administrative complaint with the employer agency or sue in federal court, but only after giving a 30-day notice to the EEOC of his intent to sue.⁴ Such notice must be given within 180 days of the alleged discriminatory practice. *Ibid.*

It is undisputed that petitioner did not seek any administrative review of his Title VII and ADEA claims before he filed suit in the district court, nor did he provide the EEOC with notice of his intention to sue.⁵ Petitioner thus failed to comply with the exhaustion requirement of Title VII and the administrative notice requirement of the ADEA. Dismissal of petitioner's Title VII and ADEA claims in these circumstances was entirely proper.

The district court's dismissal of petitioner's Equal Pay Act claim for failure to exhaust administrative remedies is somewhat problematic, inasmuch as the D.C. Circuit has held that exhaustion is not required prior to seeking judicial relief. *Ososky v. Wick*, 704 F.2d 1264 (1983). See also *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) (failure to exhaust collective bargaining grievance procedures does not bar civil suit against private party). This issue, however, is not appropriate for this Court's review because petitioner will suffer no prejudice

⁴The Act now authorizes the EEOC to decide ADEA claims. The Civil Service Commission formerly handled these claims. See 43 Fed. Reg. 19807 (1978); 29 C.F.R. 1613.501-1613.521.

⁵Petitioner's original administrative complaint of July 3, 1980, merely stated that he had been denied equal pay for equal work and made no reference to any other type of discrimination (Pet. App. 5). That complaint, therefore, did not involve Title VII or ADEA administrative procedures.

from the dismissal of his appeal. Pursuant to the district court's order of August 15, 1983, petitioner is free to pursue his Equal Pay Act claim.⁶

It is respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1983

⁶Any difficulties with the Equal Pay Act's statute of limitations (29 U.S.C. 255(a)) may be cured by resort Rule 60(b)(6), Fed. R. Civ. P.